Supreme Court, U.S.
FILED
JUL 6 1992
OFFICE OF THE CLERK

92-149

No.

In The
Supreme Court of the United States
OCTOBER TERM 1992

PULSAR DATA SYSTEMS, INC., a/k/a PULSAR CREDIT CORP. and PULSAR CORP.,
Petitioner,

v.

FEDERAL MARKETING CONSULTANTS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

KEVIN G. HEALY,
Counsel of Record,
CHRISTOPHER R. LOCKE
EILEEN M. FORD
CHILDERSTON, FROEHLICH
FUNK, HEALY & LOCKE, P.A.
200 Continental Drive
Suite 440
Newark, Delaware 19713
(302) 368-4200

July 6, 1992

QUESTIONS PRESENTED

1. Whether Va. Code § 8.01-329.C., providing for service of process solely by ordinary mail, violates the requirement of actual notice under the Due Process Clause, by making such service conclusive upon mailing?

2. Whether, under the circumstances of this case, the Due Process Clause requires a more reliable form of mail service than ordinary mail, in order for such service to be conclusive upon mailing?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Virginia are those in the caption. However, because the petitioner is questioning the constitutionality of a Virginia statute, 28 U.S.C. § 2403 (b) may be applicable and therefore a copy of the Writ of Certiorari has been served upon the Attorney General of the Commonwealth of Virginia.

Disclosure Required By Rule 29.1.

Petitioner Pulsar Data Systems, Inc. has no parent companies or subsidiaries. Pulsar Credit Corp. is the former name for Pulsar Data Systems, Inc. Pulsar Corp. is simply a trade name.

TABLE OF CONTENTS

Page

Questions Presented.....i

Parties to the Proceeding.....ii

Disclosure Required By Rule 29.1.....ii

Table of Authorities.....v

Opinions Below.....1

Basis for Jurisdiction.....2

Constitutional and Statutory Provisions Involved.....2

Statement of the Case.....3

Raising of the Federal Question.....5

Reasons For Granting The Writ.....6

I. THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY FOR THE COURT TO CLARIFY THE DUE PROCESS REQUIREMENT OF ACTUAL NOTICE AS SET FORTH IN *MENNONITE BOARD OF MISSIONS V. ADAMS*.....6

A. Va. Code § 8.01-329.C. Providing That Service of Process By Ordinary Mail Is Conclusive Upon Mailing, Violates the Due Process Guarantee of Actual Notice.....6

B. Under the Circumstances of This Case, Actual Notice Requires That the Defendant Receive Notice Before Service Can Be Deemed Conclusive.....9

C. Actual Receipt of Notice Is A Necessary Precondition to Conclusiveness of Mail Service Under Fed. R. Civ. P. 4(c) and Under the Supreme Court's 1982 Proposed Amendment to Rule 4.....13

II. DUE PROCESS REQUIRES MORE RELIABLE MAIL SERVICE THAN ORDINARY MAIL BEFORE SUCH SERVICE CAN BE DEEMED CONCLUSIVE.....16

A. Virginia Stands Alone Among Jurisdictions In Permitting Ordinary Mail Service To Be Conclusive Upon Mailing.....17

B. Petitioner's Due Process Rights Outweigh Virginia's Interest In Maintaining A Law Making Ordinary Mail Service Conclusive Upon Mailing.....19

Conclusion.....20

TABLE OF AUTHORITIES

Cases **Page**

Basile v. American Filter Service, Inc.,
Va. Supr., 340 S.E. 2d 800 (1986)..... 6,7

Grannis v. Ordean,
234 U.S. 385 (1914).....7

Greene v. Lindsey,
456 U.S. 444 (1982).....8, 16, 17 19

Mennonite Board of Missions v. Adams,
462 U.S. 791 (1983).....*passim*

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950).....*passim*

Tulsa Professional Collection Services v. Pope,
485 U.S. 478, 108 S.Ct. 1340 (1988)..... 9

Walker v. City of Hutchinson,
352 U.S. 112 (1956).....7

Page

Constitution, Statutes, Regulations, Guidelines, and Rules

U.S. Const. Amend. XIV .....*passim*

28 U.S.C. § 331..... 13

28 U.S.C. § 1257(a)..... 2

28 U.S.C. § 2072.....13

28 U.S.C. §§2072-2074..... 13

28 U.S.C. § 2074(a)..... 13

28 U.S.C. § 2403(b)..... ii

Pub. L. No. 97-227 (H.R. 6663).....15

Pub. L. No. 97-462, 96 Stat. 2527 (1982)..... 16

Fed. R. Civ. P. 4..... 13, 16

Fed. R. Civ. P. 4(c)..... 13, 16

Fed. R. Civ. P. 4(c)(2)(C)(ii)..... 16

Fed. R. Civ. P. 4(d)(8) (as proposed in 1982).....13,14, 19

39 C.F.R. § 111.1.....14

Domestic Mail Manual, Issue 42
(eff. March 15, 1992) ("DMM")..... 14, 15

Page

State Statutes and Regulations

Va. Code § 8.01-328.1..... 3, 7

Va. Code § 8.01-328.1.A.1..... 3

Va. Code § 8.01-329..... *passim*

Va. Code § 8.01-329.C..... *passim*

Legislative History Sources

Changes In Federal Summons Service Under Amendment to Rule 4 of The Federal Rules of Civil Procedure, 96 F.R.D. 81 (1982)..... 13,14,16

128 Cong. Rec. H9848-49 (1982).....16

128 Cong. Rec. H9856 (1982).....16

Miscellaneous

Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 Va. L. Rev. 1183 (1987).....15,16

No.

In The
Supreme Court of the United States
OCTOBER TERM 1992

PULSAR DATA SYSTEMS, INC., a/k/a PULSAR CREDIT CORP. and PULSAR CORP.,
Petitioner,

v.

FEDERAL MARKETING CONSULTANTS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Petitioner ("Pulsar") herein respectfully prays that a writ of certiorari issue to review the Order of the Circuit Court of Virginia, Fairfax County, entered on September 6, 1991 as well as the Order of the Supreme Court of Virginia entered on April 7, 1992 affirming the decision below.

OPINIONS BELOW

There are no reported opinions below. The decision of the Circuit Court of Fairfax County consists of an Order dated September 6, 1991 denying Pulsar's motion to vacate the default judgment. (Appendix, A9-A11) The decision of the Supreme Court of Virginia consists of an Order dated April 7, 1992 (Appendix, A18) denying Pulsar's Petition for Appeal of the lower Court's denial of the motion to vacate, along with a

Written Statement of Fact (Appendix, A12-A17) agreed upon by the parties and submitted in lieu of a trial transcript .

BASIS FOR JURISDICTION

The final judgment of the Supreme Court of Virginia was entered on April 7, 1992. The federal question was raised as indicated at p. 5, infra. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), since Va. Code § 8.01-329 (and the state court's application of such statute) is repugnant to the Constitution of the United States and infringes upon rights specially set up and claimed under the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

(1) United States Constitution, Fourteenth Amendment, providing in pertinent part:

> "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

(2) Va. Code § 8.01-329, the full text of which is set forth in the Appendix at A1-A3.

STATEMENT OF THE CASE

Pulsar Data Systems, Inc. a/k/a Pulsar Credit Corporation and Pulsar Corporation ("Pulsar") is a corporation organized and existing under the laws of the State of Delaware. At all times relevant to this case Pulsar's principal business office was located in Maryland. Pulsar's primary business activity includes marketing computer products and related office equipment and services to the federal government and to commercial enterprises.

Federal Marketing Consultants, Inc. ("FMC"), is a Virginia corporation. FMC is a consulting firm whose primary business activity consists of acting as a facilitator for clients seeking business relationships with government agencies.

On February 13, 1989 Pulsar entered into a Consulting Agreement with FMC. Pursuant to the agreement FMC was to provide expertise in preparing, submitting and negotiating GSA Multiple Award Schedule Contracts. In consideration for FMC's services Pulsar was to pay $30,000.00 per year at the rate of $2,500.00 per month.

The Consulting Agreement was for a term of one year and was to continue in force until terminated by either party in writing a minimum of thirty (30) days before the effective date of termination. Pulsar paid all payments due under the agreement for the 1989 year. Believing it had terminated the contract in accordance with the terms, Pulsar ceased making payments to FMC in 1990. (Whether or not the contract was officially terminated has never been determined in a court of law for reasons which will become apparent).

On April 1, 1991, FMC filed a Motion for Judgment against Pulsar in the Circuit Court of Fairfax County, Virginia requesting the sum of $38,373.41 plus costs and attorney fees. The basis for jurisdiction over Pulsar was Va. Code § 8.01-328.1.A.1.,Virginia's long arm statute, providing for personal

jurisdiction over persons transacting business in the Commonwealth. Although challenged below, this Petition does not concern the issue of territorial jurisdiction.

Pursuant to Va. Code § 8.01-329, FMC served the Secretary of the Commonwealth of Virginia with service of process on April 12, 1991. On April 19, 1991 the Secretary of the Commonwealth allegedly mailed, by first class mail, a copy of the Summons and Motion for Judgement to Pulsar's registered office in Delaware (Pulsar acts as its own registered agent), which address is recorded in the Delaware Secretary of State's office as Omega Professional Center, Suite B-86, Newark, DE 19713. A Certificate of Compliance as required by Va. Code § 8.01-329.C. was filed with the Circuit Court of Fairfax County.

Having no response from Pulsar, on May 20, 1991 FMC filed a Notice and Motion scheduling a hearing for the purpose of obtaining a default judgment against Pulsar. On May 28, 1991 a default judgment was entered in the amount of $38,373.41 together with costs and attorney fees. (Appendix, A4-A5)

On June 27, 1991 Pulsar received a letter at its Maryland office requesting that Pulsar pay the above judgment. Pulsar contends this was the first time they became aware of the suit in Virginia and the entry of the default judgment. (Written Statement of Facts, ¶8, Appendix, A13-14) Immediately thereafter, Pulsar obtained counsel and sought to have the default judgment vacated. A hearing was held on July 26, 1991. At the hearing Pulsar argued that it never received a copy of the Summons and Motion for Judgment allegedly mailed by the Secretary of the Commonwealth and that therefore the Circuit Court did not have personal jurisdiction due to insufficiency of service of process. (Written Statement of Facts, ¶¶7-8, Appendix, A13-14) Pulsar's main contention was that Va. Code § 8.01-329.C. does not provide for a method of service that is reasonably calculated to insure

adequate service of process because it provides only that the Secretary of the Commonwealth of Virginia mail the process to the defendant and then file a certificate of compliance saying that process was made available to Pulsar. *Id.* Pulsar contended that it was denied due process of law under the law of the United States Constitution and of the Commonwealth of Virginia. Pulsar's Motion to Vacate was denied from the bench at the conclusion of the brief hearing on July 26.

On September 6, 1992 the Circuit Court entered a written order denying the motion. (Appendix, A9-11) On September 26, 1992 Pulsar filed a Petition for Appeal. On April 7, 1992 the Supreme Court of Virginia denied Pulsar's petition. (Appendix, A18) Having exhausted its remedies in Virginia, Pulsar has filed this Petition.

Raising of the Federal Question

The federal question here presented was originally raised by Pulsar's Motion to Vacate Default Judgment filed on July 16, 1991, (Appendix, A6-A7 at ¶1), and at the July 26, 1991 hearing on such motion before the Virginia Circuit Court (see Written Statement of Facts, ¶8, at Appendix A12-A17). Pulsar's motion was denied from the bench on July 26, which denial was set forth as a formal Order on September 6, 1991 (Appendix, A9-A11). The federal question was again asserted in Pulsar's objections to the September 6, 1991 Order as a first step in the appeal process. (Appendix, A10-A11) Again the question was asserted in Pulsar's brief in support of its Petition for Appeal. The Supreme Court of Virginia denied the petition in its Order of April 7, 1992. (Appendix, A18)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY FOR THE COURT TO CLARIFY THE DUE PROCESS REQUIREMENT OF ACTUAL NOTICE AS SET FORTH IN *MENNONITE BOARD OF MISSIONS V. ADAMS*.

A. *Va. Code § 8.01-329.C. Providing That Service of Process By Ordinary Mail Is Conclusive Upon Mailing, Violates the Due Process Guarantee of Actual Notice.*

This case squarely presents the constitutional question of whether service of process by ordinary mail, deemed to be conclusive upon mailing, fails to provide "actual notice" as required by the Due Process Clause. To answer the question presented, the Court will be asked to revisit primarily *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). It is believed to be an issue of first impression before this Court, the resolution of which will have important constitutional ramifications. Granting certiorari will provide the Court an excellent opportunity to supply critical clarification as to the meaning of actual notice under *Mennonite*, and whether the Virginia law in question[1] satisfies the "actual notice" requirement.

According to Va. Code § 8.01-329, service upon the Secretary of the Commonwealth ("Secretary"), as Pulsar's statutory agent, is "sufficient" upon Pulsar provided the Secretary forwards notice and a copy of the process to Pulsar by ordinary mail. *Id.*, § 8.01-329.C. The Virginia Supreme Court has held that "there is no basis under § 8.01-329[2] for

[1] Va. Code § 8.01-329, set out in full in Appendix, A1-3.

[2] At the time of the *Basile* case § 8.01-329.C. required notice to be sent "by registered or certified mail, with delivery receipt requested."

invalidating service on the statutory agent because of the defendant's failure to receive actual notice of the suit." *Basile v. American Filter Service, Inc.*, Va. Supr., 340 S.E. 2d 800, 802 (1986) (footnote supplied, see below). As long as the requirements of the statute are met "service is complete and conclusive." *Id.* This interpretation was upheld and applied in this case by the Virginia Circuit Court of Fairfax County.[3] Pulsar's Petition for Appeal was refused, the Virginia Supreme Court holding that there was no reversible error in the Circuit Court's judgment.[4] It is submitted that the Virginia statute, as applied in this case, fails to afford notice of proceedings initiated against Pulsar required by the Due Process Clause of the Fourteenth Amendment.

Over time the Court has developed a now familiar palette of due process principles, the application of which has varied depending on the circumstances and conditions presented by a given case.[5] "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This fundamental right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314,

---

This requirement was removed by amendment in 1987 in favor of service by ordinary mail. See 1987amendments, Appendix, A2-3.

3 See September 6, 1991 Order (Appendix, A9-11), whereby Pulsar's motion to vacate the default judgment was formally denied on the sole grounds that process was served upon the Secretary of the Commonwealth and the Secretary mailed notice to Pulsar by first class mail at its last known address, "rendering said service of process adequate under the long arm statute of Virginia at Va. Code § 8.01-328 [actually § 8.01-328.1] and 329." (Appendix, A9-10)

4 See April 7, 1992 Order of the Virginia Supreme Court. (Appendix, A18)

5 In determining the nature and sufficiency of notice required by due process, this Court has given great weight to the circumstances of the particular case. *Mullane*, at 314-15 (notice is constitutionally adequate when "the practicalities and peculiarities of the case...are reasonably met."); *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956) ("notice required will vary with circumstances and conditions.")

quoted in *Greene v. Lindsey*, 456 U.S. 444, 449 (1982). Personal service is clearly the ideal form of notice to defendants that a legal proceeding has been initiated against them, since it guarantees actual notice of the pending action. *Greene*, at 449. Yet the Court has recognized the need "*in some situations*" to allow judicial proceedings to be prosecuted "on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service." *Id.* (emphasis supplied)

The standard consistently utilized by the Court in evaluating what situations require actual notice, and where less rigorous notice procedures are acceptable, is supplied by *Mullane*. See *Greene*, at 449-50. Delivering the opinion of the Court in *Mullane* Justice Jackson wrote:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane, at 314 (emphasis supplied).

In 1983, citing *Mullane* as controlling its analysis, the Court in *Mennonite* appears to have circumscribed those situations under which anything less than actual notice will be acceptable, holding as follows:

> Notice by mail or other means as certain *to ensure actual notice* is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Mennonite, at 800 (emphasis supplied). Justice O'Connor filed the dissenting opinion which referred to the above

holding as a "novel and unjustified principle" and as a significant departure from the Court's prior decisions. *Id.* at 800-801. However, five years later Justice O'Connor delivered the majority opinion in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 108 S.Ct. 1340 (1988) in which the *Mennonite* holding (requiring actual notice) was applied and followed to reach a similar result. *Tulsa*, at 108 S. Ct. 1345.

There can be little doubt that *Mennonite's* requirement of "actual notice" applies to the instant case. The proceeding initiated by respondent ("FMC") in Virginia, being one to collect money damages for breach of contract, is one which would adversely affect the property interests of petitioner ("Pulsar"), and Pulsar's identity and address were known. Accordingly, the ultimate inquiry is whether Va. Code § 8.01-329, and its operation in this case, satisfied the "actual notice" requirement. However, primary consideration must be given to the meaning of "actual notice."

B. *Under the Circumstances of This Case, Actual Notice Requires That the Defendant Receive Notice Before Service Can Be Deemed Conclusive.*

In both *Mullane* and *Mennonite* the Court found notice by publication alone to be inadequate, holding that mailed notice was the minimum required to satisfy due process. However, the cases reveal that the conclusiveness of mailed notice is dependent upon the circumstances of the particular case.[6] Whereas in *Mullane* the Court found that under the circumstances "reasonable risks that notice might not actually reach every beneficiary are justifiable," *Id.* at 319, given the circumstances in *Mennonite* the Court stressed the importance of a party actually receiving notice. *Id.* at 800.

In *Mullane* this Court was asked to decide what form of

[6] See note 5, *supra*.

notice was constitutionally required to be given numerous beneficiaries of a New York based common trust fund, with respect to a judicial settlement of accounts. *Id.* at 309. The only notice given was by way of publication in a local newspaper. The Court held that under the circumstances, notice by publication was not adequate and that due process required notice to be given "at least by ordinary mail." *Id.* at 318. It went to some length to explain why notice by ordinary mail was constitutionally sufficient under the circumstances:

> This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.

Id. at 319.

Put simply, *Mullane's* message is that where there is safety in numbers, notice by ordinary mail will suffice, despite reasonable risks that not everyone will actually receive notice. It follows that under different circumstances, notice by ordinary mail, along with the attendant risks of nonreceipt, may not be compatible with due process.

Mennonite addressed the question whether "notice by publication and posting provides a mortgagee of real property with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes." *Id.* at 792. Under the circumstances, it was critical that the mortgagee receive actual notice since, unlike *Mullane*, there were no other parties with identical interests. Accordingly, the Court in *Mennonite* held

that the form of notice employed must be designed to "*ensure actual notice*." *Id.* at 800 (emphasis supplied). This is a "minimum constitutional precondition to a proceeding which will adversely affect the ... property interest of any party..." *Id.*

Notice by publication and posting were held to be constitutionally inadequate in *Mennonite* because such methods were "unlikely to *reach*" the mortgagee. Id. at 799 (emphasis supplied). Instead, the mortgagee was constitutionally entitled to personal service or mailed notice. *Id.* In describing the Court's holding, Justice O'Connor (writing for the dissent) paraphrased the majority opinion as holding that the mortgagee "*must receive* personal service or mailed notice..." *Mennonite*, at 805 (emphasis supplied).

The circumstances of this case demand that notice be received before ordinary mail service is permitted to be the basis for a default judgment. Here, actual receipt of notice is even more critical than in *Mennonite*. In *Mennonite* there existed other possible means by which the mortgagee of real property might learn of a tax sale proceeding. The publication and posting procedures for tax sales were clearly defined by state law so that a mortgagee of real property " could have safeguarded its interest with a minimum amount of effort." *Id.* at 808 (dissenting opinion). In addition, the mortgagee could have established procedures with the mortgagor to ensure that the annual tax assessment had been paid (e.g. depositing tax monies in an escrow account). *Id.* at 809.

This case involves the commencement of civil litigation for breach of contract against a lone nonresident defendant. Nowhere is the actual receipt of notice more critical to ensuring a defendant's right to be heard. Unlike the numerous beneficiaries in *Mullane*, Pulsar did not have the safety net of other persons with identical interests, capable of protecting Pulsar's interests. Unlike the mortgagee in *Mennonite*, there were no other means for Pulsar to learn of the pending

litigation or otherwise protect its interests, other than receiving actual notice of the suit which would afford it the opportunity to defend. In this case, the actual consequence of ordinary mail notice not reaching Pulsar was the entry of a default judgment against Pulsar in excess of $50,000.[7]

In making service of process conclusive upon the act of mailing notice by ordinary mail, Va. Code § 8.01-329.C. is in disregard of *Mennonite's* actual notice requirement, and thus violative of due process. Regardless of whether or not a defendant receives actual notice of the legal proceedings, § 8.01-329.C. effectively precludes a defendant that has not received notice, from an opportunity to be heard on the merits. The requirement of actual notice was recognized by this Court to ensure one's fundamental right to be heard. "This right to be heard has little reality or worth," *Mullane,* at 314, where notice by mail is deemed to be conclusive upon mailing.

It is analogous to holding that personal service is conclusive upon delivery of process into the hands of the process server. Under this scenario, once process or notice is placed into the "delivery system", a defendant is forever barred from complaining that notice was never received. While that seems absurd, that is the effect of § 8.01-329. This harsh result is inescapable as long as the plaintiff can produce a certificate of compliance from the Secretary of the Commonwealth to the effect that notice was forwarded to the defendant by first class mail. *See* Va. Code §8.01-329.C.

Here, Pulsar moved promptly to defend the case on the merits upon learning of its existence. Prior to receiving the letter of June 27, 1991 at its Maryland address, Pulsar was not informed of the pending litigation and therefore did not have the opportunity to choose whether to appear or default. For Pulsar, the Virginia law rendered its constitutional right to be

7 The principal amount of the judgment was $38,373.41, along with attorneys fees and costs. Attorneys fees pursuant to the contract between the parties would be 33-1/3% which amounts to $12,791.14, bringing the total above $50,000.

heard, worthless.

C. *Actual Receipt of Notice Is A Necessary Precondition to Conclusiveness of Mail Service Under Fed. R. Civ. P. 4(c) and Under The Supreme Court's 1982 Proposed Amendment to Rule 4.*

Both Congress and this Court (in the context of its rule-making authority) have considered the conclusive effect of mail service, determining that actual receipt of notice is a necessary precondition to conclusiveness. In 1982, pursuant to its rule-making authority under then 28 U.S.C. § 2072,[8] the Supreme Court adopted amendments to Fed. R. Civ. P. 4.[9] Such amendments automatically take effect if Congress fails to act on them within a prescribed period of time.[10] Rule 4 was amended to add subdivision (d)(8) providing for mail service as follows:

---

8 As of 1988 the Supreme Court's Rule making power has been defined at 28 U.S.C. §§ 2072-2074. Formerly, such powers were defined only at § 2072.

9 The rules adopted by the Supreme Court were initially drafted, reviewed and approved by the Judicial Conference (defined at 28 U.S.C. § 331) and its committees. "In the case of the Federal Rules of Civil Procedure, the initial draft is prepared by the Advisory Committee on Civil Rules. The Advisory Committee's draft is then reviewed by the Committee on Rules of Practice and Procedure, which must give its approval to the draft. Any draft approved by the committee is forwarded to the Judicial Conference. If the Judicial Conference approves the draft, it forwards the draft to the Supreme Court." Excerpt from the Congressional Record, relating to the Federal Rules of Civil Procedure Amendments Act of 1982, reprinted in "Changes In Federal Summons Service Under Amendment to Rule 4 of The Federal Rules of Civil Procedure," 96 F.R.D. 81, 117 n. 1 (hereafter referred to as "*Changes*").

10 In 1982, 28 U.S.C. § 2072 provided that the Rules would take effect after the expiration of 90 days from the date they were reported to Congress. Currently, Congress has 7 months during which to consider proposed rule changes. 28 U.S.C. §2074(a).

> (8) Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a United States marshal or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. If delivery of the process is refused, the person serving the process, promptly upon the receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit. Any such default or judgment by default shall be set aside pursuant to Rule 5(c) or Rule 60(b) if the defendant demonstrates to the Court that the return receipt was signed or delivery was refused by an unauthorized person.[11]

It is interesting to note that the method of mail service adopted by the Supreme Court is *the* most reliable method made available by the United States Postal Service.[12] The

11 The Supreme Court's 1982 Amendments to the Federal Rules of Civil Procedure appear in the Congressional Record which is reprinted in *Changes, supra.* n.9, at 123-25.

12 The bible of the United States Postal Service is the Domestic Mail Manual ("DMM"), which is incorporated by reference in the Code of Federal Regulations at 39 C.F.R. § 111.1. Registered and certified mail are considered "Special Services". DMM Issue 42 (eff. March 15, 1992), Ch.9, §§ 911 and 912. "Registered mail is the most secure service the Postal Service offers. It incorporates a system of receipts to monitor the mail's movement from the point of acceptance to delivery." DMM § 911.11. "Certified mail service provides the sender with a mailing receipt and a record of delivery at the office of address." DMM, § 912.11. Return receipts and restricted delivery service are considered "Supplemental Services". DMM at subchapter 930, §§ 932.11 and 933.1. "Return

amendment makes clear that service of a summons and complaint by mail was not conclusive ("shall not be the basis for the entry of a default or a judgment by default") unless actual notice reached the defendant. Actual notice was demonstrated either by a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant.

Refusal constitutes actual notice since it demonstrates that the addressee to whom delivery was restricted, received the mail but chose to refuse it. Even then, a defendant refusing process would be given a second bite at the apple. Upon receipt of notice of refusal, the person serving process is required to again mail (this time by first class mail) to the defendant a copy of the summons and complaint along with a notice informing the defendant that judgment by default will be rendered against him unless he appears to defend the suit. Finally, a default judgment entered in accordance with the rule would be set aside where it is demonstrated that the return receipt was signed or delivery was refused by an unauthorized person.

Congress decided to get into the act, and voted to postpone consideration of the 1982 changes to Rule 4.[13] The Supreme Court's proposal for mail service was attacked by critics who "argued that certified mail is not an effective method of providing actual notice to defendants of claims against them because signatures may be illegible or may not match the name

---

receipt service furnishes a mailer with evidence of delivery... After delivery, the Postal Service mails the return receipt to the sender." DMM§ 932.11. "Restricted delivery service permits a mailer to direct delivery only to the addressee or the addressee's agent. The addressee must be an individual (or natural person) specified by name." DMM, § 933.1.

13 Public Law 97-227 (H.R. 6663). See Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 Va. L. Rev. 1183, 1197-1212 (1987) (hereafter "*Sinclair*"). Contains a detailed account of the legislative history leading to Rule 4(c), which the author submits is the first exploration of such history in print. *Id.* at 1198.

of the defendant, or because it may be difficult to determine whether mail has been 'unclaimed' or 'refused' the latter providing the sole basis for a default judgment."[14]

Congress passed its own version of Rule 4 containing a very different provision for mail service,[15] which is current Fed. R. Civ. P. 4(c). A copy of the summons and complaint may be mailed by first class mail to the person to be served, but is not conclusive service unless the defendant returns a written acknowledgment of service. See Fed. R. Civ. P. 4 (c)(2)(C)(ii). If no such acknowledgement is received by the sender within 20 days after mailing, service of the summons and complaint must be made by a form of personal service prescribed by Rule 4. *Id.*

II. DUE PROCESS REQUIRES MORE RELIABLE MAIL SERVICE THAN ORDINARY MAIL BEFORE SUCH SERVICE CAN BE DEEMED CONCLUSIVE.

An alternative question posed by this case is, assuming it is consistent with due process for mail service to be conclusive upon mailing, whether a more reliable form of mail service than ordinary mail is required before service is deemed conclusive. It cannot be disputed that ordinary mail is the least reliable form of mail service.[16] For defendants Va. Code

14 128 Cong. Rec. H9848-49 (daily ed. Dec. 15, 1982) (written statement of Robert McConnell, Assistant Attorney General), reprinted in "Changes", *supra.* n. 9, at 116, 133-35 (1982), *cited by Sinclair, supra.* n.13, at 1209, n. 145.

15 See 128 Cong. Rec. H9848, H9856 (daily ed. Dec. 15, 1982) enacting Pub. L. 97-462, 96 Stat. 2527 (1982), *cited in Sinclair, supra.* n. 13, at 1210, n. 152. "The bill as finally approved was expressly modeled on the California system of service of process by mail." *Id.* at 1211, n. 155.

16 See note 12 *supra.* and accompanying text for discussion of the special and supplemental mail services offered by the U.S. Postal Service above and beyond ordinary mail. For this Court's remarks on the unreliability of mail service, see *Greene v. Lindsey*, 456 U.S. 444, 455,

§8.01-329.C. is a double barrel shotgun. It requires nothing more than ordinary mail service, while at the same time making such service conclusive upon mailing. It places the defendant who does not receive notice in a "Catch-22" predicament. Despite its lack of protective mailing features, the defendant that does not receive notice is forever barred from defending on the merits based solely on the certification of the Secretary that notice was sent by ordinary mail.

Pulsar submits that if mail service is to be deemed conclusive upon mailing, due process requires a method more reliable than ordinary mail. While it does not appear that this question has been directly addressed by the Court,[17] it follows from both *Mullane* and *Mennonite* that something more reliable than ordinary mail is required under the circumstances presented here.[18]

A. *Virginia Stands Alone Among Jurisdictions In Permitting Ordinary Mail Service To Be Conclusive Upon Mailing.*

Virginia stands alone in permitting service by ordinary mail (in the first instance) to be conclusive upon mailing. In forty-five (45) jurisdictions (including the District of Columbia) notice by ordinary mail is not sufficient (in the first instance) to

---

n.9 where the majority recognizes that "process served by mail is far from the ideal means of providing the notice the Due Process Clause of the Fourteenth Amendment requires..." and the dissent speaks of "the risks that notice mailed to public housing projects might fail due to loss, misdelivery, lengthy delay, or theft" adding that "[i]t is no secret, after all, that unattended mailboxes are subject to plunder by thieves." *Id.* at 460

[17] While *Mullane* specified "ordinary mail" to be the least that was required under the circumstances, it left the door open for cases where something more than ordinary mail may be required. *Id.* at 318; see discussion *supra.* at pp. 9-10. *Mennonite* did not specify the particular form of mailed notice required, but insisted upon a method that was "certain to ensure actual notice." *Id.* at 800; see discussion *supra.* at pp. 10-12.

[18] Pulsar relies on its analysis at pp. 9-12 *supra.* in support of this position. In the interest of brevity, this analysis will not be repeated here.

obtain personal jurisdiction over a nonresident defendant.[19] Of the remaining jurisdictions that do not require more than ordinary mail service,[20] Virginia appears to be the only jurisdiction where the service of process statute expressly makes such service conclusive.[21] Curiously, up until 1987, Virginia was in step with the majority of jurisdictions in requiring notice by certified or registered mail. Amendments to Va. Code § 8.01-329.C. in 1987 removed the registered or certified mail requirement in favor of the less stringent requirement of ordinary mail.

Here, Pulsar alleges that it never actually received the notice that the Secretary was supposed to have sent by ordinary mail. The difficulty, if not impossibility, of proving a negative are obvious. It is the ordinary mail requirement that places a defendant in this predicament, and which resulted in the entry of a default judgment against Pulsar.

---

[19] See Appendix, A19-21, for citation of relevant service of process statutes and/or rules for all jurisdictions. The jurisdictions not included among the 45 are Georgia, Maryland, Massachusetts, Mississippi, New Hampshire and Virginia.

[20] Georgia, Maryland, Massachusetts, Mississippi, New Hampshire and Virginia. See Appendix A19-21 for citations. It should be noted that Georgia does not make provision for mail service. A defendant outside the state may be served through personal service or publication. When the address is known a copy of the published notice must be sent to the defendant.

[21] Va. Code § 8.01-329.C. provides that service "shall be *sufficient* upon the person to be served," (emphasis supplied) providing that the Secretary notifies the defendant by ordinary mail and files a certificate to this effect. The Virginia Supreme Court has interpreted this statute as effecting conclusive service upon mailing. See *supra.*, pp. 6 and 7.

B. *Petitioner's Due Process Rights Outweigh Virginia's Interest In Maintaining A Law Making Ordinary Mail Service Conclusive Upon Mailing.*

Determining the adequacy of notice involves balancing the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." *Mullane*, at 314. On the balance in this case is Virginia's interest in obtaining jurisdiction over persons necessary to finally resolve disputes arising out of the transaction of business in the Commonwealth, and Pulsar's right to actual notice and the opportunity to be heard which only arises upon receipt of such notice. The protections of the Due Process Clause require the balance to be struck in favor of Pulsar.

While it may not be this Court's responsibility to prescribe the form of service that Virginia should adopt,[22] Virginia's use of ordinary mail service, deemed conclusive upon mailing, is not reasonable when there are alternative methods of ensuring actual notice which would not place any significant additional burden on the Commonwealth. The problem presented by this case could be meaningfully addressed by more reliable forms of mail service which would ensure actual notice before permitting the entry of default judgments.[23] This would be consistent with the interests of the Commonwealth as well as the interests of defendants.

---

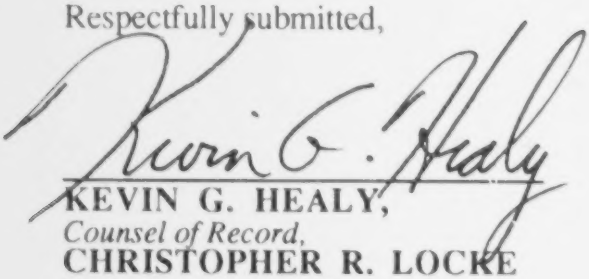
22 See *Greene v. Lindsey*, 456 U.S. 444, 455, n.9 ("It is not our responsibility to prescribe the form of service that the Commonwealth should adopt.")

23 See, e.g., the Supreme Court's 1982 proposal for mail service, Rule 4(d)(8), discussed *supra*. at Section I.C. Also see notes 19-20 *supra* along with accompanying text, demonstrating that the overwhelming majority of jurisdictions require a method of notice more reliable than ordinary mail.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



KEVIN G. HEALY,
Counsel of Record,
CHRISTOPHER R. LOCKE
EILEEN M. FORD
CHILDERSTON, FROEHLICH
FUNK, HEALY & LOCKE, P.A.
200 Continental Drive
Suite 440
Newark, Delaware 19713
(302) 368-4200

No.

In The
Supreme Court of the United States
OCTOBER TERM 1992

PULSAR DATA SYSTEMS, INC., a/k/a PULSAR CREDIT CORP. and PULSAR CORP.,
Petitioner,

v.

FEDERAL MARKETING CONSULTANTS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITIONER'S APPENDIX

Table of Contents **Page**

Va. Code § 8.01-329..... A1-A3

Default Judgment Order (May 28, 1991).....A4-A5

Motion To Vacate Default Judgment
(July 16, 1991).....A6-A8

September 6, 1991 Order of
Circuit Court of Fairfax County, Virginia.....A9-A11

Written Statement of Fact
Pursuant to Rule 5:11 Of The Rules Of
The Supreme Court Of Virginia..... A12-A17

April 7, 1992 Order of
The Supreme Court of Virginia.....A-18

Service of Process Statutes and
Rules for All Jurisdictions..... A19-A21

§ 8.01-329. Service of process or notice; service on Secretary of Commonwealth.

A. When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made in the same manner as is provided for in Chapter 8 (§ 8.01-285 et seq.) of this title in any other case in which personal jurisdiction is exercised over such a party, or process or notice may be served on any agent of such person in the county or city in this Commonwealth in which that agent resides or on the Secretary of the Commonwealth of Virginia, hereinafter referred to in this section as the "Secretary," who, for this purpose, shall be deemed to be the statutory agent of such person.

B. When service is to be made on the Secretary, the party or his agent or attorney seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

When the person to be served is a resident, the signature of an attorney, party or agent of the person seeking service on such affidavit shall constitute a certificate by him that process has been delivered to the sheriff or to a disinterested person as permitted by § 8.01-293 for execution and, if the sheriff or disinterested person was unable to execute such service, that the person seeking service has made a bona fide attempt to determine the actual place of abode or location of the person to be served.

C. Service of such process or notice on the Secretary shall be made by the plaintiff's, his agent's or the sheriff's leaving a copy of the process or notice, together with a copy of the affidavit called for in subsection B hereof and the fee prescribed in § 14.1-103 in the office of the Secretary in the

City of Richmond, Virginia. Service of process or notice on the Secretary may be made by mail if such service otherwise meets the requirements of this section. Such service shall be sufficient upon the person to be served, provided that notice of such service, a copy of the process or notice, and a copy of the affidavit are forthwith mailed, by the Secretary to the person or persons to be served at the last known post-office address of such person, and a certificate of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action. Service of process or notice on the Secretary shall be effective on the date the certificate of compliance is filed with the court in which the action is pending.

D. Service of process in actions brought on a warrant or motion for judgment pursuant to § 16.1-79 or § 16.1-81 shall be void and of no effect when such service of process is received by the Secretary within ten days of any return day set by the warrant. In such cases, the Secretary shall return the process or notice, the copy of the affidavit, and the prescribed fee to the plaintiff or his agent. A copy of the notice of the rejection shall be sent to the clerk of the court in which the action was filed.

E. The Secretary shall maintain a record of each notice of service sent to a person for a period of two years. The record maintained by the Secretary shall include the name of the plaintiff or the person seeking service, the name of the person to be served, the date service was received by the Secretary, the date notice of service was forwarded to the person to be served, and the date the certificate of compliance was sent by the Secretary to the appropriate court. The Secretary shall not be required to maintain any other records pursuant to this section. (Code 1950, § 8-813; 1977, c. 617; 1979, c. 31; 1986, c. 388; 1987, cc. 449, 450, 459; 1990, c. 741.)

The 1987 amendments. - Acts 1987, cc. 449 and 459 are identical, and deleted "nonresident" preceding "party" and substituted "in which that agent resides" for "in which he resided" in subsection A; inserted "or his agent or attorney" in the first paragraph of subsection A1, added the second paragraph of subsection A1; inserted "the plaintiff's, his agent's or the sheriff's" in the first sentence of subsection b, inserted the present second sentence of subsection B, substituted "are forthwith mailed" for "are forthwith sent by registered or certified mail, with delivery receipt requested" in the third sentence of subsection B, added the fourth sentence of subsection B; and added subsection B1.

Acts 1987, c. 450 inserted "or his attorney or agent" following "seeking service" in the first sentence of subsection A1.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FEDERAL MARKETING CONSULTANTS, INC.,	:	
Plaintiff,	:	
v.	:	At Law No. 104433
PULSAR DATA SYSTEMS, INC., a/k/a PULSAR CREDIT CORPORATION and PULSAR CORPORATION,	:	
Defendant.	:	

DEFAULT JUDGMENT ORDER

THIS MATTER came on to be heard Friday, May 24, 1991, upon plaintiff, FEDERAL MARKETING CONSULTANTS, INC.'S, motion for judgment and upon plaintiff, FEDERAL MARKETING CONSULTANTS, INC.'S, motion for the entry of a default judgment against defendant, PULSAR DATA SYSTEMS INCORPORATED, a/k/a PULSAR CREDIT CORPORATION and PULSAR CORPORATION; and

IT APPEARING TO THE COURT that the Secretary of the Commonwealth mailed the motion for judgment to the defendant, PULSAR, on april 19, 1991, and the certificate of compliance was filed on April 22, 1991; and

IT FURTHER APPEARING TO THE COURT that more than twenty-one (21) days has elapsed since April 22, 1991,

and no responsive pleadings have been filed by or on behalf of defendant, PULSAR DATA SYSTEMS INCORPORATED, a/k/a PULSAR CREDIT CORPORATION and PULSAR CORPORATION, since April 22, 1991, and that the defendant, PULSAR DATA SYSTEMS INCORPORATED, a/k/a PULSAR CREDIT CORPORATION and PULSAR CORPORATION is in default within the meaning of Rules 3:5 and 3:17 of the Rules of the Supreme Court of Virginia; it is therefore

ADJUDGED and ORDERED that plaintiff, FEDERAL MARKETING CONSULTANTS, INC., be and hereby is granted judgment against the defendant, PULSAR DATA SYSTEMS INCORPORATED, a/k/a PULSAR CREDIT CORPORATION and PULSAR CORPORATION, in the amount of thirty eight thousand three hundred seventy three dollars and forty one cents ($38,373.41) together with its costs and attorney fees.

ENTERED this 28th day of May 1991.

_____

JUDGE

_____

JOHN P. SNIDER
MATTHEWS, SNIDER & WILLIAMS
VIRGINIA STATE BAR NUMBER: 17949
Counsel for Plaintiff
4161 Chain Bridge Road
Fairfax, Virginia 22030
(703) 273-1131

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FEDERAL MARKETING CONSULTANTS, INC.,	)	
Plaintiff,	)	
v.	)	At Law No. 104433
PULSAR DATA SYSTEMS, INC., a/k/a PULSAR CREDIT CORPORATION and PULSAR CORPORATION,	)	
Defendant.	)	

MOTION TO VACATE DEFAULT JUDGMENT

Defendant, Pulsar Data Systems, inc., a/k/a Pulsar Credi Corporation and Pulsar Corporation, by and through the undersigned counsel, moves the Court pursuant to Rule 1:1 o the Rules of the Supreme Court of Virginia to vacate its Defaul Judgment Order entered on the 28th day of May, 1991, on the following grounds:

1. Pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia, the Default Judgment Order is voi because of the insufficiency of process upon the Defendan and/or the insufficiency of service of process upon the Defendant resulting in lack of jurisdiction over said Defendant.

2. As Defendant believes in good faith that it ha reasonable defenses to Plaintiff's action at law, it would work a manifest injustice upon Defendant to permit the Defaul Judgment Order to stand.

WHEREFORE, Defendant, Pulsar Data Systems, Inc.

a/k/a Pulsar Credit Corporation and Pulsar Corporation, by counsel, pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia, requests that the Order dated May 28, 1991, granting default judgment against Defendant to Plaintiff, be vacated and that Defendant be granted twenty-one (21) days from the date of entry of this Order to file a responsive pleading to Plaintiff's Motion for Judgment.

PULSAR DATA SYSTEMS, INC.
a/k/a PULSAR CREDIT CORP.
and PULSAR CORPORATION

By Counsel

Andrew F. Palmieri (VSB No. 28375)
FLINN & BEAGAN
Suite 440
8330 Boone Boulevard
Vienna, Virginia 22182
(703) 448-6800

and

Christopher R. Locke, Esquire
CHILDERSTON, FROEHLICH, HEALY & LOCKE, P.A.
200 Continental Drive, Suite 440
Newark, Delaware 19713
(302) 368-4200

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Vacate a Default Judgment was mailed, postage prepaid, this 16th day of July 1991, to:

Mary Gayle Holden, Esquire
Leonard, Ralston, Stockman & Stanton
2 Pigeon Hill Drive
Suite 530
Sterling, Virginia 22170

and

John Snider, Esquire
Matthews, Snider & Williams
4161 Chain Bridge Road
Fairfax, Virginia 22030

_____

Andrew F. Palmieri

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FEDERAL MARKETING CONSULTANTS, INC.,	:	
Plaintiff,	:	
v.	:	At Law No. 104433
PULSAR DATA SYSTEMS, INC., a/k/a PULSAR CREDIT CORPORATION and PULSAR CORPORATION,	:	
Defendant.	:	

ORDER

THIS MATTER came to be heard upon the motion of Defendant, Pulsar Data Systems, Inc., a/k/a Pulsar Credit Corporation and Pulsar Corporation, by counsel, upon a Motion to Vacate Default Judgment;

IT APPEARING TO THE COURT that the Defendant was served with process through the Secretary of the Commonwealth and that said Secretary mailed by first class mail the documents to Defendant's registered agent at its last known post office address being, Omega Professional Center, Suite B-86, Newark, Delaware 19713, rendering said service of process adequate under the long arm statute of Virginia at Va. Code § 8.01-328 and 329; it is therefore

ADJUDGED, ORDERED AND DECREED that Defendants motion is DENIED and that Default Judgment rendered against Defendant is not void as a matter of law.

AND THIS MATTER IS FINAL.
ENTERED this 6th day of September, 1991.

_____
Michael P. McWeeny
Judge, Circuit Court
Fairfax County, Virginia

WE ASK FOR THIS:

_____
Mary Gayle Holden, Esquire
Leonard, Ralston, Stockman & Stanton
2 Pigeon Hill Drive
Suite 530
Sterling, VA 22170

Counsel for Plaintiff

SEEN AND OBJECTED TO on the following grounds:

1. Defendant was denied due process of law under the laws of the United States of America and the Commonwealth of Virginia.

2. The Court lacked personal jurisdiction over the Defendant, as Va. Code
§ 8.01-329 does not provide a method of service that is reasonably calculated to give Defendant notice and an

opportunity to be heard.

3. Defendant did not transact business in Virginia thereby depriving the Court of personal jurisdiction under Va. Code § 8.01-328 (the long arm statute).

4. The defendant has meritorious defenses to Plaintiff's action at law.

Robert J. Beagan, Esquire
VSB No. 1678
Flinn & Beagan
8330 Boone Blvd.
Suite 440
Vienna, VA 22182
(703) 448-6800

Christopher R. Locke, Esquire
Childerston, Froehlich,
Healy & Locke, P.A.
200 Continental Drive
Suite 440
Newark, DE 19713
(302) 368-4200
Counsel for Defendant

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY, VIRGINIA

FEDERAL MARKETING CONSULTANTS, INC.,	:	
Plaintiff-Appellee,	:	
v.	:	Civil No. 104433
PULSAR DATA SYSTEMS, INC., a/k/a PULSAR CREDIT CORPORATION and PULSAR CORPORATION,	:	
Defendant.-Appellant.	:	

WRITTEN STATEMENT OF FACT PURSUANT TO RULE 5:11 OF THE RULES OF THE SUPREME COURT OF VIRGINIA

COMES NOW, defendant-appellant, Pulsar Data Systems Incorporated, a/k/a Pulsar Credit Corporation and Pulsar Corporation (hereinafter "Pulsar"), by counsel, pursuant to Rule 5:11 of the Rules of the Supreme Court of Virginia, and hereby submits a written statement of fact in lieu of a trial transcript..

1. On April 1, 1991, plaintiff-appellee filed a Motion for Judgment against defendant-appellant seeking the amount of $38,373.41 together with costs and attorneys fees.

2. Pursuant to Va. Code § 8.01-329(A) plaintiff-appellee served a copy of the Motion for Judgment on the Secretary of the Commonwealth on April 12, 1991 for the

purpose of obtaining service of process upon the defendant-appellant.

3. Pursuant to Va. Code § 8.01-329(C), the Secretary of the Commonwealth mailed a copy of the Motion for Judgment to defendant-appellant on April 19, 1991.

4. Pursuant to Va. Code § 8.01-329(C), the Secretary of the Commonwealth filed a Certificate of Compliance with the Circuit Court of Fairfax County on April 22, 1991.

5. On or about May 20, 1991, plaintiff-appellee filed a Notice and Motion indicating that on May 24, 1991 at 10:00 a.m. a hearing will be heard at which plaintiff-appellee will request that the Court enter judgment by default against defendant-appellant for failure to timely respond.

6. On May 28, 1991, it appearing to the Circuit Court of Fairfax County that: (1) the Secretary of the Commonwealth mailed the Motion for Judgment to Pulsar on April 19, 1991; (2) a certificate of compliance having been filed on April 22, 1991; and (3) twenty-one (21) days having elapsed with no responsive pleading from Pulsar; and (4) that Pulsar was in default within the meaning of Rules 3:5 and 3:17 of the Rules of the Supreme Court of Virginia, the Court ordered that plaintiff-appellee be granted judgment in the amount of $38,373.41 together with costs and attorneys fees.

7. On July 16, 1991, defendant-appellant filed a Motion to Vacate the Default Judgment based upon the following grounds: (1) insufficiency of service of process resulting in lack of jurisdiction over the defendant-appellant; and (2) that defendant-appellant in good faith believed that it has meritorious defenses to the action at law.

8. On July 26, 1991, a hearing was held on said Motion to Vacate Default Judgment during which Counsel for the defendant-appellant argued that the Service of Process as required under the Va. Code § 8.01-329 was void as it does not provide for service which is reasonably calculated to insure adequate service of process. Counsel for the defendant-appellant also argued that Pulsar first discovered that the default judgment was entered against it only after it received a letter dated June 27, 1991, from counsel for the plaintiff-appellee at its Maryland address stating that a default judgment was entered on May 28, 1991. Counsel for the defendant-appellant further argued that Virginia's long-arm statute Va. Code § 8.01-328(A)(1) did not apply because the defendant-appellant conducted no business in Virginia and did not have substantial contact with the Commonwealth to warrant that it be subject to the jurisdiction of Virginia courts under the long arm statute. Counsel for the defendant-appellant further argued that the address furnished by FMC to the Virginia Secretary of the Commonwealth for service on Pulsar was not the correct address for Pulsar.

9. At the hearing on July 26, 1991, counsel for plaintiff-appellee presented an affidavit stating that the affiant called the Secretary of State in Delaware and was informed of the following: (1) Pulsar's registered Office in Delaware is listed as Pulsar Data Systems, Inc., Omega Professional Center, Suite B-86, Newark, DE 19713; (2) Registered agent is William W. Davis, Sr., Omega Professional Center, Suite B-86, Newark, DE 19713; and (3) The Corporation was in good standing as of March 5, 1991.

10. Counsel for plaintiff-appellee further argued that in three cases filed previous theretofore by the plaintiff-appellee against the defendant-appellant in the Fairfax County General District Court, the plaintiff-appellee had served the defendant-appellant with service through the Secretary of the

Commonwealth of Virginia pursuant to Va. Code Section 8.01-329. The address provided for the defendant-appellant in all three cases used was the same address provided for the defendant-appellant in the instant matter. Counsel for the plaintiff-appellee also argued that president of the Corporation had met with the president of the plaintiff-appellee in Virginia to assist in the work that was being done under the contract.

11. Counsel for the defendant-appellant was not afforded an opportunity to rebut the arguments of counsel for plaintiff-appellee contained in paragraph 11 above. If counsel for the defendant-appellant was given an opportunity to rebut the argument of counsel for the plaintiff-appellee he would have argued the contrary.

12. After hearing all of the arguments presented, the Judge denied Pulsar's motion to vacate the default judgment.

13. On September 6, 1991 a signed order was entered by the trial court Judge denying Pulsar's motion to vacate the default judgment. The order was accepted and signed by counsel for plaintiff-appellee. The order was also signed by counsel for defendant-appellant as "seen and objected to" for the following grounds:

a. Defendant was denied due process of law under the law of the United States of America and the Commonwealth of Virginia.

b. The Court lacked personal jurisdiction over the Defendant as Va. Code § 8.01-329 does not provide a method of service that is reasonably calculated to give Defendant notice and an opportunity to be heard.

c. Defendant did not transact business in Virginia

thereby depriving the Court of personal jurisdiction under Va. Code § 8.01-328 (the long arm statute).

d. Defendant has meritorious defenses to Plaintiff's action at law.

14. On September 26, 1991 defendant-appellant caused a Notice of Appeal to be filed.

PULSAR DATA SYSTEMS, INC.
a/k/a Pulsar Credit Corporation and
Pulsar Corporation

BY COUNSEL:

_____ Date:_____

Andrew F. Palmieri, Esquire
Palmieri and Palmieri, P.C.
VSB No. 28375
8027 Leesburg Pike
Suite 207
Vienna, Virginia 22182

_____ Date: _____

Christopher R. Locke, Esquire
Childerston, Froehlich,
Funk, Healy & Locke, P.A.
200 Continental Drive
Suite 440 Newark, Delaware 19713

FEDERAL MARKETING
CONSULTANTS, INC.

BY COUNSEL:

_____ Date:_____

Mary Gayle Holden, Esquire
Leonard, Ralston, Stockman & Stanton
2 Pigeon Hill Drive
Suite 530
Sterling, VA 22170

Date:_____

_____
Judge, Fairfax County
Circuit Court

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 7th day of April, 1992.

Pulsar Data Systems, Inc., a/k/a
Pulsar Credit Corporation and
Pulsar Corporation,

Appellant,

against Record No. 911844
Circuit Court No. L-104433

Federal Marketing Consultants, Inc.,

Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal..

A copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

Alabama - Rules of Alabama Supreme Court 4.2 (1990);
Alaska - Alaska Stat. § 09.05.015 (1983), § 10.06.175 (1989)
Alaska Rules of Civ. Proc. 4 (1990)
Arizona - Ariz. Rev. Stat. Ann. § 10-014 (1990); A.R.S. Rules of Civ. Proc., Rule 4E(2)(a) and (b);
Arkansas - Ark. Stat. Ann. § 16-58-120 (1987);
California - Cal. Corp. Code §2111 (West 1990);
Colorado - Colo. Rev. Stat. Ann. § 52-59(b) (West 1991); Colo. Rev. Stat. Ann. § 33-411 (c and d) (West. Supp. 1992);
Connecticut - Conn. Gen. Stat. Ann. § 33-411 (West. 1990)
Delaware - Del. Code Ann. tit. 10 § 3104 (Supp. 1990)
Dist. of Columbia - D.C. Code Ann. § 29-399.9(c) (1991)
Florida - Fla. Stat. Ann. § 48.151 (West 1969)
Fla. Stat. Ann. § 48.161 (West Supp. 1992)
Georgia - Ga. Code Ann. § 9-10-94 (1982)
Ga. Code Ann. § 9-11-4 (Supp. 1991)
Ga. Code Ann § 14-2-1510 (Supp. 1991)
Hawaii - Haw. Rev. Stat. § 634-31 (1985)
Haw. Rev. Stat. § 634-35 (1985)
Haw. Rev. Stat. § 634-36 (Supp. 1990)
Haw. Rev. Stat. § 415-14 (Supp. 1990)
Idaho - Idaho Code § 30-1-14 (Supp. 1992)
Idaho Rules of Civ. Proc. 4(d)(4) (1987)
Illinois - Ill. Ann. Stat. ch. 32, para 5.25(c) (Smith Hurd Supp. 1992)
Ill. Ann. Stat. ch. 32, para 5.30 (Smith-Hurd Supp. 1992)
Indiana - Ind. Code Ann. Court Rule § 4.10 (Burns 1992)
Iowa - Iowa Code Ann. § 617.3 (West Supp. 1992)
Kansas - Kan. Stat. Ann. § 60-304(f) (1983)
Kentucky - Ky. Rev. Stat. Ann. § 454.210 (Baldwin 1991)
Louisiana - La. Rev. Stat. Ann. § 13:3201 (West 1991)

La. Rev. Stat. Ann. § 13:3204 (West 1991)

Maine - Me. Rev. Stat. Ann. tit. 13-A §§ 1213, 1217 (1981)

Maryland - Md. Rules of Circuit Court 2-124 (1992)
Md. Cts. and Jud. Proc. Code Ann. § 6-307 (1989)

Massachusetts - Mass. Gen. Laws Ann., ch. 181, § 15 (West Supp. 1992)

Michigan - Mich. Stat. Ann. § 27A. 1920 (Callaghan 1986)

Minnesota - Minn. Stat. Ann. § 303.13 (West Supp. 1992)

Mississippi - Miss. Code Ann. § 13-3-57 (1991)
Miss. Rules of Civ. Proc. 4 (1990)

Missouri - MO. Ann. Stat. § 506.150 (Vernon Supp. 1992)
MO. Ann. Stat. § 506.192 (Vernon Supp. 1992)
Supreme Court Rule 54.20 (1992)

Montana - Mont. Rules of Civ. Proc. 4(c) (1991)

Nebraska - Neb. Rev. Stat §§ 25-505.01, 25-509.01, 25-540 (1989)

Nevada - Nev. Rev. Stat. § 14.030 (1991)

New Hampshire - N.H. Rev. Stat. Ann. § 293-A:119-121 (1987)

New Jersey - N.J. Rules of Civ. P. 4:4-4 (1992)

New Mexico - N.M. Stat. Ann. § 38-1-6 (1987)

New York - N.Y. Civ. Prac. L and R § 302 (McKinney 1990)
N.Y. Bus. Corp. § 307 (McKinney 1986)

North Carolina - N.C. Gen. Stat. § 55-5-04 (1990)
N.C. Rules of Civ. Proc. 1A-1, Rule Y(i)(6) (1990)

North Dakota - N.D. Cent. Code § 10.19.1-129 (1985)
N.D. Rules of Civ. Proc. 4(d)(2)(D) (1992)
N.D. Cent. Code § 10-22-10 (1985)

Ohio - Ohio Rev. Code Ann. § 1703.19 (Anderson 1985)
Ohio Rules of Civ. Proc. 4.3(B)(1) (Anderson Supp. 1991)

Oklahoma - Okla. Stat. Ann. tit. 12, § 2004 (West Supp. 1992)

Oregon - Or. Rev. Stat. § 60.731 (1988)

Or. Rev. Stat. § 60.121 (1988)

Pennsylvania - 42 Pa. Cons. Stat. Ann. §§ 5322, 5323 (Purdon 1981)

Rhode Island - R.I. Gen. Laws § 9-5-33 (1985)
R.I. Superior Court Rules of Civ. Proc. 4e(1)(2) (1992)

South Carolina - S.C. Code Ann. § 15-9-245 (Law. Co-op, Supp. 1991)

South Dakota - S.D. Codified Laws § 47-8-17 (1991)
S.D. Codified Laws § 47-8-18 (1991)
S.D. Codified Laws § 15-6-4(d) (Supp. 1992)
S.D. Codified Laws § 15-7-2 (Supp. 1992)
S.D. Codified Laws § 15-7-3 (1984)

Tennessee - Tenn. Code Ann. § 20-2-215 (1980)
Tenn. Code Ann. § 20-2-216 (1980)

Texas - Tex. Civ. Prac. and Rem. Code Ann. §§ 17.044, 17.045 (Vernon 1986)

Utah - Utah Code Ann. §§ 16-10-13 and 78-27-25 (1992)
Utah Court Rules Ann. 4 (1992)

Vermont - Vt. Stat. Ann. tit. 12, § 855 (1973)
Vt. Stat. Ann. tit. 12, § 856 (1973)

Virginia - VA. Code Ann. § 8.01.329.C. (Supp. 1991)

Washington - Wash. Rev. Code Ann. § 23.3.05.040 (Supp. 1992)

West Virginia - W. VA. Code § 56-3-33 (Supp. 1992)
W. VA. Rules of Civ. Proc. 4(d)(7) (1992)

Wisconsin - Wis. Stat. Ann. § 180.0504 (1992)

Wyoming - Wyo. Stat. § 5-1-107
Wyo. Rules of Civ. P. 4(d)(4) and (l) (1991)

Supreme Court, U.S.
F I L E D
SEP 2 1992
OFFICE OF THE CLERK

No. 92-149

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

PULSAR SYSTEMS, INC., A/K/A PULSAR CREDIT CORP. AND PULSAR CORP.,
Petitioner

v.

FEDERAL MARKETING CONSULTANTS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JERRIS LEONARD,
Counsel of Record
MARY GAYLE HOLDEN
LEONARD, RALSTON,
STOCKMAN & STANTON
2 Pidgeon Hill Drive
Suite 530
Sterling, Virginia 22170
703-450-5606

September 2, 1992

QUESTION PRESENTED

Does Va. Code Section 8.01-329C, providing for service on the Secretary of the Commonwealth and the mailing of a copy of the summons and motion to the defendant by first class postage prepaid, violate the Due Process Clause?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 4
ARGUMENT 6
CONCLUSION 13
RESPONDENT'S APPENDIX 14

TABLE OF AUTHORITIES

Cases:

Basile v. American Filter Service, Inc., 231 Va. 34, 340 S.E.2d 800 (1986) 8

Greene v. Lindsey, 456 U.S. 444, 72 L.E.2d 249, 102 S.Ct. 1874 (1982) 7

Mennonite Board of Missions v. Adams, 462 U.S. 791, 77 L.E.2d 180, 103 S.Ct. 2706 (1983) 7

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950) 6,7,10,11

Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988) 7,12

Walker v. City of Hutchinson, 352 U.S. 112, 1 L.E.2d 178, 77 S.Ct. 200 (1956) 7

Constitution, Statutes, and Rules:

U.S. Constitution Amendment XIV ..... *Passim*
Va. Code Section 8.01-328.1 6
Va. Code Section 8.01-329 ..... *Passim*
Rules of the Supreme Court of the United States, Rule 29.3 9

No. 92-149

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

PULSAR SYSTEMS, INC., A/K/A PULSAR CREDIT CORP. AND PULSAR CORP.,
Petitioner

v.

FEDERAL MARKETING CONSULTANTS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent herein respectfully requests that this Court deny the Petitioner's Petition for Writ of Certiorari filed previously hereto in this matter.

STATEMENT OF THE CASE

The Respondent in this case, Federal Marketing Consultants, Inc. ("FMC") is a corporation organized and existing under the laws of the Commonwealth of Virginia. [1] The Consulting Agreement

---

[1] FMC has no parent company or subsidiary.

between FMC and the Petitioner in this case, Pulsar Data Systems, Inc., a/k/a Pulsar Credit Corporation and Pulsar Corporation, ("Pulsar") was executed by the parties in the Commonwealth of Virginia. At the time of the execution of the Consulting Agreement, the parties contemplated that the work to be performed thereunder would be performed by FMC in the Commonwealth of Virginia and the District of Columbia. The president of Pulsar met with representatives of FMC in the Commonwealth of Virginia on several occasions to assist in the work being performed under the Consulting Agreement. At no time subsequent to the execution of the Consulting Agreement was Pulsar registered in Virginia as a foreign corporation qualified to do business therein.

Subsequent to the filing of a Motion for Judgment against Pulsar under the Consulting Agreement, service was had on Pulsar through the Secretary of the Commonwealth pursuant to Va. Code Section 8.01-329. The Secretary of the Commonwealth mailed a copy of the Summons and the Motion for Judgment to Pulsar by prepaid, first class mail, and filed a Certificate of Compliance with the clerk of the Circuit Court of Fairfax County, Virginia as proof thereof.

Pulsar argued at the July 26th hearing that FMC had failed to use the proper address. However, FMC presented as evidence

stationary from Pulsar showing the exact address used by the Secretary of the Commonwealth. Furthermore, at no time during these proceedings did Pulsar present evidence that the Summons and copy of the Motion for Judgment mailed by the Secretary of the Commonwealth had been returned to the office of the Secretary of the Commonwealth as undeliverable.

SUMMARY OF ARGUMENT

1. THIS COURT HAS ALREADY DETERMINED THE DEFINITION OF ACTUAL NOTICE UNDER THE DUE PROCESS REQUIREMENT

A. Service by Regular Mail Does Not Violate the Due Process Guarantee of Actual Notice

This Court has previously held that the Due Process Clause of the Fourteenth Amendment requires actual notice before a person can be deprived of his property rights. But this Court has consistently and repeatedly ruled that mailing by first class, prepaid mail constitutes actual notice. Under this principle, long established by the United States Supreme Court, the Virginia law in question meets the notice requirements of the Due Process Clause.

B. The Due Process Clause Does Not Require Actual Receipt of Notice Under the Facts of This Case

There is no support for Pulsar's position that the Due Process Clause requires actual receipt of actual notice.

C. Va. Code Section 8.01-329 Meets the Requirements of Actual Notice

Under the case law well-established by this Court, Virginia Code Section 8.01-329 provides for actual notice as required under the Due Process Clause.

2. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT ANY ACTION BEYOND ACTUAL NOTICE

The situation in which Pulsar finds itself is one of its own making. Pulsar could have protected against service through the Secretary by appointing a registered agent in the Commonwealth of Virginia of its own selection, one who would presumably notify Pulsar by something other than regular mail. The circumstances of this case do not warrant the requirement of anything more than actual notice by first class, prepaid mail.

3. THE REQUIREMENT OF ACTUAL RECEIPT OF NOTICE WOULD OVERBURDEN STATE AND LOCAL GOVERNMENTS

If actual receipt of actual notice is required, the court system would be overburdened, and the time necessary to ensure compliance therewith would significantly and adversely effect the efficiency of justice.

ARGUMENT

1. THIS COURT HAS ALREADY DETERMINED THE DEFINITION OF ACTUAL NOTICE UNDER THE DUE PROCESS REQUIREMENT

A. Service by Regular Mail Does Not Violate the Due Process Guarantee of Actual Notice

Under Va. Code Section 8.01-329 , if personal jurisdiction is authorized under Va. Code Section 8.01-328.1 (the "Virginia long-arm statute") service may be had through the Secretary of the Commonwealth if the corporation is a foreign corporation that has failed to appoint a registered agent in Virginia. Service through the Secretary provides notice to the defendant through regular mail to the last known address of the defendant. Pulsar's position is that only actual receipt of actual notice by a defendant is sufficient to satisfy the tenets of the Due Process Clause.

Previously, this Court has had ample opportunity to examine the question of what manner of notice is required under the Due Process Clause of the United States Constitution. Beginning with *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), it has consistently held that service under the Due Process Clause requires

notice that is "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action..." *Id.* at 314 (emphasis added). The reasonableness of the notice is based of the particular circumstances of each case. *Id.* Under the *Mullane* decision, when service is had by publication, mailing of notice by regular first class mail is deemed to constitute actual notice thereof.

Subsequent to *Mullane*, an entire body of law has evolved which has clearly established the principle that mailing by regular mail meets the criteria for actual notice under the Due Process Clause. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 479 (1988) ; *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) ; Greene v. Lindsey, 456 U.S. 445 (1982); *Walker v. City Hutchinson*, 352 U.S. 112 (1956).

Defendant claims that Va. Code Section 8.01-329 violates the Due Process Clause because it is contrary to the holding in *Mennonite* requiring that constitutional notice must be designed to provide actual notice, as that term is defined therein. Plaintiff's Petition at 12. Pulsar has misapplied *Mennonite*. In the opinion in that case, this Court, citing *Mullane*, stated that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the ... property interests of any party..." . *Id.*, at 800. This

opinion equated mailed notice to actual notice. Since there is no requirement for notice beyond that provided by first class mail, Va. Code Section 8.01-329 meets the standard constitutional test of due process.

Pulsar claims that because Virginia law permits service by ordinary mail to be conclusive upon mailing, its due process interests have been violated by the state's failure to require receipt of actual notice. Pulsar cites *Basile v. American Filter Service, Inc.*, Va. , 340 S.E.2d 800 (1986) as holding that service can not be invalidated because of the defendant's failure to receive notice. Defendant's Petition at 7. However, Pulsar has misstated the Virginia Supreme Court's holding. The question posed to the Virginia Supreme Court in that case was whether or not a trial court had exceeded its authority under a particular Va. statute to set aside a default judgment. That statute permitted a default judgment to be set aside only in three clearly definable sets of circumstances. The Virginia Supreme Court held that since none of those circumstances had been met, the trial court had exceeded its authority under the statute. The positions attributed by Pulsar as to the conclusiveness of service are mere *dicta*. Moreover, the court's opinion does not conclude that a defendant has no recourse once notice is placed in the "delivery system", as asserted by Pulsar. Defendant's Petition at

12. To the contrary, the Virginia Supreme Court emphasized that while the particular statute in question there did not permit the court to overturn the default judgment, a defendant has other remedies to challenge the failure to receive notice.

B. The Due Process Clause Does Not Require Actual Receipt of Actual Notice Under the Facts of This Case

Pulsar has conspicuously failed to cite any cases that support its assertion that actual receipt of actual notice is mandated by the Due Process Clause. Instead, it attempts to bolster its position by claiming that forty-five jurisdictions require mailing by certified or registered mail. Pulsar overlooks the fact that the statutes it cites are only a singular part of each state's civil process requirements. Even among those states that may require notice under the long-arm statute to be mailed by certified or registered, return receipt requested mail, many states permit mailing by regular first class mail when service is had through publication, or in other instances of substituted service.[2] The Federal Rules of Civil Procedure do not require service to be by certified or registered return receipt requested mailing. Even the Rules of this Court permit service by mailing first class postage prepaid. Rules of the Supreme Court of the United States, Rule 29.3 .

---

[2] See Appendix A-1 for citation of relevant statutes or rules

C. Va. Code Section 8.01-329 Meets the Requirements of Actual Notice

The Va. Code Section 8.01-329 provides that when a corporation, such as Pulsar, does business in Virginia but fails to qualify a registered agent to accept process, the Secretary of the Commonwealth is to serve as the agent of such company. Service is made on the Secretary by the sheriff of the City of Richmond, Virginia. The Secretary mails a copy of the summons and pleading, and certifies such action in writing. This notice provision meets the standards that this Court has followed since *Mullane*.

2. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT ANY ACTION BEYOND ACTUAL NOTICE

The circumstances of this case do not require anything beyond the mailing of the summons and motion for judgment served on the Secretary of the Commonwealth. Pulsar neglects to note that the lack of notice of which it is complaining is a product of its own doing. Pulsar could have qualified as a foreign corporation doing business in Virginia, and could have appointed a resident to serve as agent to receive service of process in the event of civil litigation. Had it done so, Pulsar's selected agent, and not the statutorily appointed agent, would have been personally served with notice of the Virginia suit. (Under Pulsar's argument, Pulsar would have been

denied sufficient notice even if its self-appointed agent had sent a copy of the notice by regular mail.)

Pulsar refused to comply with Virginia law, and now complains that Virginia law should be nullified to excuse its own willful misfeasance.

3. THE REQUIREMENT OF ACTUAL RECEIPT OF ACTUAL NOTICE WOULD OVERBURDEN STATE AND LOCAL GOVERNMENTS

Pulsar asks this Court to overturn the entire *Mullane* line of cases and hold that only actual receipt of actual notice is sufficient under the Due Process Clause. Pulsar fails to establish the parameters of what it maintains would constitute actual receipt of actual notice. If actual receipt of actual notice was satisfied by certified or registered return receipt requested, this would place a heavy burden on the courts or governing entities in terms of time and cost. Moreover, even Pulsar admits that this is not always an effective method of ensuring notice.

To properly ensure actual receipt of actual notice would require more than a certified or registered, return receipt requested letter. The court or governmental entity would need to obtain the notarized signature of the individual defendant or the notarized signature of an authorized person for the non-individual defendant,

acknowledging the acceptance of notice. This would place an intolerable burden on the courts, local entities, and the plaintiffs.

Because of the judicial precedent that allows notice to be sent by regular mail, it is likely that virtually every state and every local jurisdiction permit some notices effecting property interests to be delivered by regular first class mail. Pulsar would require that every state and jurisdiction rewrite its laws and ordinances, when there is already a judicially approved method - first class prepaid mailing - that is "an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice". *Tulsa*, at 490. Pulsar's position would needlessly overextend the constitutional definition of actual notice. Notice beyond first class prepaid mail is not constitutionally required.

CONCLUSION

This Court has already held that notice by regular mail is sufficient notice under the Due Process Clause. Pulsar has not submitted any case law or practical justification that should cause this Court to overrule its previous decisions. For these reasons, FMC asks that Pulsar's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Federal Marketing Consultants, Inc.
By Counsel

JERRIS LEONARD,

Counsel of Record

MARY GAYLE HOLDEN
LEONARD, RALSTON,
STOCKMAN & STANTON
2 Pidgeon Hill Drive
Suite 530
Sterling, Virginia 22170
703-450-5606

No. 92-149

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

PULSAR SYSTEMS, INC., A/K/A PULSAR CREDIT CORP. AND PULSAR CORP.,
Petitioner

FEDERAL MARKETING CONSULTANTS, INC.,
Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S APPENDIX

Statutes and Rules of Other Jurisdictions

Alabama - Ala. Code of 1975, Section 43-2-198.
Alaska - Alaska Statutes, 1986 Rev., Section 10.05.642
Arizona - Ariz. Rules of Civil Procedure 4(d).
California - Cal. Code of Civil Procedure 415.50.
Colorado - Colo. Rules of Civil Procedure 4(h).
District of Columbia - D.C. Code Section 29-399.9(b).
Florida - Fla. Statutes Section 49.12.
Georgia - Code of Ga., Annot., Section 9-11(e).
Idaho - Idaho Code, Sections 5-508, 5-509.
Illinois - Ill. Rules of Civil Procedure 60.1.
Kansas - Kans. Stat. Annot., Section 60.307.
Maine - Me. Rules of Civil Procedure 4(g).
Maryland - Rules of Civil Procedure 2-122(a).
Minnesota - Rules of Civil Procedure 4.04.
Mississippi - Miss. Rules of Civil Procedure 4.
Missouri - Mo. Rules of Civil Procedure 54.17.
Nebraska - Neb. Rev. Stat., Section 25-520.01.
New Mexico - N.M. Rules of Civil Procedure 1.004(G).
North Carolina - N.C. Gen. Stat. 1A-1, N.C. R.C.P. 4(j).
North Dakota - N.D. R.C.P. 4.
Oregon - O. R.C.P. 7(D).
South Dakota - S.D. Cod. Laws, Section 15-9-16 et seq.
Utah - U. R.C.P. 4(f).
Vermont - V. R.C.P. 4(g).
Washington - W. R.C.P. 4(d).
West Virginia - W.Va. R.C.P. 4(e).
Wisconsin - W. Stat. 801.11.